

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JAMES S. NOLAND,

Plaintiff,

v.

CIV-08-0056 JB/LFG

CITY OF ALBUQUERQUE; BERNALILLO COUNTY BOARD OF COMMISSIONERS; BERNALILLO COUNTY METROPOLITAN DETENTION CENTER; Bernalillo County Metropolitan Detention Center Administrator HARRY TIPTON, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator MIKE SISNEROS, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator RONALD TORRES, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator HENRY PEREA, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator DONALD CRUTCHFIELD, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator MATT CANDELARIA, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator JUAN CHACON, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator MATT ELWELL, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator PAUL SALCIDO, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Administrator ERIN WORSHAM, in her individual and official capacities; Bernalillo County Metropolitan Detention Center Correctional Officer DANNY SISNEROS, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Correctional Officer ERNEST WICKAM, in his individual and official capacities; Bernalillo County Metropolitan Detention Center Correctional Officer JOSE HERNANDEZ, in his individual and official capacities,

Defendants.

AMENDED MEMORANDUM OPINION AND ORDER¹

THIS MATTER comes before the Court on Plaintiff James S. Noland's Motion for an

¹ The Court previously filed a version of this Memorandum Opinion and Order. See Memorandum Opinion and Order, filed February 5, 2009 (Doc. 44). That Memorandum Opinion and Order inadvertently did not contain the Court's signature. Accordingly, the Court is filing this Amended Order.

Extension of Time to File a Response Brief to the [County] Defendant's Motion to Dismiss or in the Alternative for Summary Judgment [sic], filed November 13, 2008 (Doc. 38)(brackets added)("Motion"). The primary issue is whether the Court should grant Plaintiff James S. Noland an extension of time to file a response to the County Defendants' Motion to Dismiss where he has thus far failed to do. The Motion improperly "omits recitation of a good-faith request for concurrence," D.N.M.LR-Civ. 7.1(a), but the certificate of service states that Noland mailed it to the City of Albuquerque's legal department and to counsel for the County Defendants. See Motion at 2. None of the Defendants have responded to the Motion.

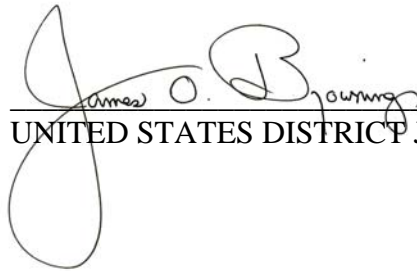
The County Defendants' Motion to Dismiss was filed on July 8, 2008. See County Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, filed July 8, 2008 (Doc. 36). Noland's response was due, therefore, "within fourteen (14) calendar days after service of the motion." D.N.M.LR-Civ. 7.4(a). The County Defendants filed a notice that briefing was complete on October 7, 2008. See Notice of Completion of Briefing on County Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, filed October 7, 2008 (Doc. 37); D.N.M.LR-Civ. 7.4(a). Mr. Noland filed his motion for an extension of time in which to respond over a month later. He does not explain why he was unable to timely file his response within the prescribed limits of the Federal Rules of Civil Procedure or the local rules. Noland's Motion requests until December 25, 2008 to file a response brief, but he has yet to submit a response to the Court.

Under the local rules of civil procedure for the United States Court for the District of New Mexico, except in pro se inmate cases, before a party files a motion, he "must determine whether [the] motion is opposed, and a motion that omits recitation of a good-faith request for concurrence may be summarily denied." D.N.M.LR-Civ. 7.1(a). Even though he appears pro se, Noland must

become familiar with, and comply with, the rules of civil procedure. See Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007)(noting that the United States Court of Appeals for the Tenth Circuit has “repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants”)(internal quotation marks omitted). “The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so[, however] constitutes consent to grant the motion.” D.N.M.LR-Civ. 7.1(b).

Under the local rules, “[a]n extension of briefing time must not interfere with established case management deadlines.” D.N.M.LR-Civ. 7.4(a). No case management deadlines have yet been established in this case. The Court, of course, cannot grant either a motion to dismiss or one for summary judgment based solely on a plaintiff’s failure to respond and must consider the merits of the motion. See Issa v. Comp USA, 354 F.3d 1174, 1177-78 (10th Cir. 2003)(holding that a court must address the merits of a motion to dismiss notwithstanding the plaintiff’s failure to respond); Reed v. Bennett, 312 F.3d 1190, 1194-95 (10th Cir. 2002)(holding that a district court cannot grant an unopposed motion for summary judgment unless the moving party has first met its burden of production and demonstrates it is legally entitled to judgment under Rule 56). Because they have not alleged prejudice and have consented to an extension of time by failing to respond to Noland’s motion, the Court concludes that an extension of time in which to respond to the motion to dismiss will further the interests of justice.

IT IS ORDERED that the Motion for an Extension of Time to File a Response Brief to the Defendant’s Motion to Dismiss or in the Alternative for Summary Judgement [sic] is granted and that Plaintiff James S. Noland shall file his response within ten days of the entry of this Memorandum Opinion and Order.



UNITED STATES DISTRICT JUDGE

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